NZ NEW IMAGE SDN BHD v. LOH YOK LIANG

COURT OF APPEAL, PUTRAJAYA
MOHD HISHAMUDIN YUNUS JCA
UMI KALTHUM ABDUL MAJID JCA
IDRUS HARUN JCA
[CIVIL APPEAL NO: W-02-1575-09-2014]
25 JULY 2016

CONTRACT: *Specific performance – Agreement – Sale and purchase of shares – Whether transaction void – Whether appellant had knowledge that company had been wound up – Whether appellant should have applied for leave of winding up court before proceeding with action to transfer shares – Whether transfer of shares sanctioned by court – Whether transfer of shares prohibited under s. 223 of Companies Act 1965 – Whether order of specific performance granted – Failure to seek alternative remedy for damages – Whether appellant entitled to rely on omnibus prayer for further reliefs – Specific Relief Act 1950, s. 18*

The appellant and the respondent entered into an agreement with respect to the sale and purchase of shares in Amore Marketing (M) Sdn Bhd ('Amore') in which the appellant agreed to purchase from the respondent 1,540,000 shares for 40 sen per share with the total purchase price of RM616,000. However, irreconcilable differences arose between the appellant and the respondent. By cl. 15 of the agreement, the appellant agreed that it could, at its option, sell its shares to the respondent in the event that the projected profit could not be reached or there was any irreconcilable dispute between the parties. Subsequent negotiations were entered into between the parties with respect to the selling price of the shares which were indicative of the exercise by the appellant, *qua* the shareholder of Amore, of their option to sell their shares in Amore to the respondent pursuant to cl. 15 of the agreement. However, negotiations failed and the appellant proceeded to file a winding up petition against Amore ('the petition'), which was dismissed. The appellant, *circa* one year after the dismissal of the winding up petition, filed the instant action in the High Court against the respondent on 2 January 2003 seeking, *inter alia,* an order that the respondent buy the appellant's shares in Amore pursuant to cl. 15 of the agreement. Amore was in the meantime wound up prior to the commencement of the trial of the instant suit ('the winding up order'). The judge dismissed the appellant's action. The appellant hence appealed against the judge's decision in not granting the order for specific performance of cl.15 of the agreement or damages *in lieu* thereof. The issue that arose was whether the appellant could sell its shares in Amore to the respondent.

Held (dismissing appeal with costs)
Per Idrus Harun JCA delivering the judgment of the court:

(1) Section 223 of the Companies Act 1965 ('Act') prohibits any transfer of shares unless such transfer is sanctioned by the court. Any such transfer would also necessarily involve an alteration in the status of the members of the company which is also prohibited if it is effected after the commencement of the winding up of the company. Section 223 is enacted to protect the interest of the creditors against disposal of the assets belonging to the company when a petition for winding up is presented. The time the petition is presented is significant because under s. 219(2) of the Act, the winding up shall be deemed to have commenced at the time of the presentation of the petition for the winding up. Hence, any prohibited transaction which takes place after the presentation of the petition is void unless the court orders otherwise. (paras 7 & 8)

(2) Since Amore was wound up on 2 September 2010, any transaction which falls within s. 223 of the Act is prohibited. No leave or sanction of the court pursuant to s. 223 was granted to the appellant by the winding up court for the purpose of the transfer of its shares in Amore to the respondent in the event the court grants an order for specific performance of cl. 15 of the agreement. Thus, based on the case of *Sullivan v. Henderson*, it was clear that in the present action, the order for specific performance could not be granted as it would entail a transfer of shares which was void as against Amore because such transfer would offend s. 223 of the Act, unless it was sanctioned by the winding up court. (paras 8-10)

(3) The prohibition under s. 223 of the Act will ensure that a shareholder will be prevented from evading liability as a contributory especially where there is an amount remaining unpaid in respect of the shares allotted to him and at the same time protects the interest of the creditors. An application for leave of the winding up court, therefore, was necessary as any such application will enable the court to determine whether leave should be given or otherwise refused for the transfer of shares in the company. In the instant matter, the appellant had ample knowledge of the winding up of Amore. Having clearly been brought to their knowledge of the winding up of Amore, the appellant should have applied for leave of the winding up judge first before proceeding with this action to transfer the shares in Amore to the respondent. (paras 21-24)

(4) Section 18 of the Specific Relief Act 1950 does not give the appellant freedom to act as they wish for it clearly stipulates that a person 'may also ask for compensation' for breach of contract which means therefore, that the appellant must necessarily pray for the compensation in the statement of claim if it is intended that the appellant wishes to also seek

for damages. The essence of the appellant's claim was for specific performance only. They did not seek the alternative remedy of damages *in lieu* of specific performance. Thus, the appellant was not entitled to rely on the ommibus prayer of 'such further or other relief as the court deems just and proper'. Such omnibus claims are not intended to cater for a situation where there is a manifest and obvious failure on the part of the parties to an action to plead material facts. Further, the appellant failed to prove damages they had suffered as they did not lead any specific evidence for the purpose of proving the damages. (paras 33-36)

Bahasa Malaysia *Headnotes*

Perayu dan responden memasuki suatu perjanjian berkenaan jual beli saham Amore Marketing (M) Sdn Bhd ('Amore') di mana perayu bersetuju untuk membeli dari responden 1,540,000 saham pada harga 40 sen setiap saham dengan jumlah harga pembelian RM616,000. Walau bagaimanapun, percanggahan yang tidak dapat diselesaikan berbangkit antara perayu dan responden. Melalui kl. 15 perjanjian, perayu bersetuju bahawa ia boleh, atas pilihannya, menjual sahamnya kepada responden sekiranya keuntungan yang dijangkakan tidak dapat dicapai atau terdapat pertikaian yang tidak boleh diselesaikan di antara pihak-pihak. Beberapa rundingan dimeterai antara pihak-pihak berkenaan harga penjualan saham yang menunjukkan tindakan perayu, *qua* pemegang saham Amore, berhubungan opsyen untuk menjual saham mereka dalam Amore kepada responden menurut kl. 15 perjanjian. Walau bagaimanapun, rundingan gagal dan perayu meneruskan dengan pemfailan petisyen penggulungan terhadap Amore ('petisyen'), yang ditolak. Perayu, setahun selepas penolakan petisyen penggulungan tersebut, memfailkan tindakan ini di Mahkamah Tinggi terhadap responden pada 2 Januari 2003 memohon, antara lain, perintah untuk responden membeli saham perayu dalam Amore menurut kl. 15 perjanjian. Amore juga sementara itu digulungkan sebelum permulaan perbicaraan guaman ini ('perintah penggulungan'). Hakim menolak tindakan perayu. Oleh itu, perayu merayu terhadap keputusan hakim yang tidak membenarkan perintah pelaksanaan spesifik kl. 15 perjanjian atau ganti rugi. Isu yang berbangkit adalah sama ada perayu boleh menjual saham-saham dalam Amore kepada responden.

Diputuskan (menolak rayuan dengan kos)
Oleh Idrus Harun HMR menyampaikan penghakiman mahkamah:

(1) Seksyen 223 Akta Syarikat 1965 melarang mana-mana pemindahan saham kecuali jika pemindahan diiktiraf oleh mahkamah. Pemindahan sebegitu juga melibatkan perubahan status ahli-ahli syarikat yang juga dilarang jika ia dilakukan selepas permulaan kuat kuasa penggulungan syarikat. Seksyen 223 digubal untuk melindungi kepentingan pemiutang terhadap pelupusan aset syarikat apabila petisyen penggulungan dikemukakan. Masa petisyen dikemukakan adalah penting kerana di

bawah s. 219(2) Akta, penggulungan disifatkan bermula pada masa pengemukaan petisyen penggulungan. Oleh itu, apa-apa transaksi yang dilakukan selepas pengemukaan petisyen adalah terbatal kecuali jika mahkamah memerintahkan sebaliknya.

(2) Oleh kerana Amore digulungkan pada 2 September 2010, apa-apa transaksi yang terangkum dalam s. 223 Akta adalah dilarang. Tiada kebenaran mahkamah menurut s. 223 diberikan kepada perayu oleh mahkamah penggulungan untuk tujuan pemindahan saham Amore kepada responden sekiranya mahkamah membenarkan perintah pelaksanaan spesifik kl. 15 perjanjian. Oleh itu, berdasarkan kes *Sullivan v. Henderson*, adalah jelas bahawa dalam tindakan ini, perintah pelaksanaan spesifik tidak boleh dibenarkan kerana ia akan melibatkan pemindaham saham yang tidak sah terhadap Amore kerana pemindahan sebegitu akan melanggar s. 223 Akta, kecuali jika ia dibenarkan oleh mahkamah penggulungan.

(3) Larangan di bawah s. 223 Akta memastikan bahawa pemegang saham akan dihalang daripada mengelak dari liabiliti sebagai penyumbang terutama apabila terdapat jumlah yang tidak dibayar berkenaan saham-saham diperuntukkan kepadanya dan pada waktu yang sama melindungi kepentingan pemiutang. Permohonan untuk kebenaran penggulungan mahkamah adalah wajib kerana permohonan tersebut akan membolehkan mahkamah menentukan sama ada kebenaran harus diberikan atau ditolak untuk pemindahan saham dalam syarikat. Dalam kes ini, perayu mengetahui bahawa Amore telah digulungkan. Dengan pengetahuan jelas bahawa Amore telah digulungkan, perayu seharusnya memohon untuk kebenaran daripada hakim mahkamah penggulungan sebelum meneruskan tindakan untuk pemindahan saham Amore kepada responden.

(4) Seksyen 18 Akta Relif Spesifik tidak memberikan perayu kebebasan untuk bertindak sesuka hati kerana ia telah dengan jelas memperuntukkan bahawa seseorang 'may also ask for compensation' untuk pelanggaran kontrak yang bermaksud perayu harus memohon ganti rugi dalam penyataan tuntutan jika perayu juga berniat untuk memohon ganti rugi. Dalam rayuan ini, intipati tuntutan perayu adalah untuk pelaksanaan spesifik sahaja. Ia tidak memohon remedi alternatif untuk ganti rugi sebagai ganti pelaksanaan spesifik. Oleh itu, perayu tidak mempunyai hak untuk bergantung kepada permohonan omnibus 'such further or other relief as the court deems just and proper.' Tuntutan-tuntutan omnibus tidak bertujuan untuk menampung keadaan di mana terdapat kegagalan pihak-pihak yang jelas dan nyata untuk memplidkan fakta-fakta material. Tambahan, perayu gagal membuktikan kerugian yang dialaminya kerana mereka tidak membentangkan apa-apa keterangan spesifik untuk membuktikan ganti rugi.

Case(s) referred to:

BIMB Musyarakah Satu Sdn Bhd v. Lee Kik Hooi & Ors [2009] 8 CLJ 529 HC ***(refd)***
Ferguson v. Wallbridge et al [1935] 3 DLR 66 ***(refd)***
Henrick International Hotels & Resorts Pte Ltd v. YTL Hotels & Properties Sdn Bhd & Ors [2003] 2 CLJ 445 CA ***(refd)***
Insofex Sdn Bhd v. Labasama Group (M) Sdn Bhd (No. 2) [2000] 6 CLJ 97 HC ***(refd)***
Jordanlane Pty Ltd v. Kimberley Jane Elizabeth Kitching Andrew [2008] VSC 426 ***(refd)***
Kimoyama Elektrik (M) Sdn Bhd v. Metrobilt Construction Sdn Bhd [1990] 2 CLJ 795; [1990] 2 CLJ (Rep) 253 HC ***(refd)***
Lee Ah Chor v. Southern Bank Bhd [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239 SC ***(refd)***
Lim Chiew v. Siteman Construction Sdn Bhd v. Khairul Anuar Mamat [2013] 1 LNS 693 HC ***(refd)***
Majumder v. Attorney-General of Sarawak [1966] 1 LNS 97 FC ***(refd)***
Osaka Resources Sdn Bhd & Ors v. Foo Holdings Sdn Bhd [2013] 1 LNS 984 CA ***(refd)***
Perbadanan Nasional Bhd v. Dato' Ibrahim Ali [2012] 1 LNS 585 HC ***(refd)***
Perisai Wira Sdn Bhd v. Harun Minat Sdn Bhd & Ors [2014] 5 CLJ 88 HC ***(refd)***
Re Gray's Inn Construction Co Ltd [1980] 1 All ER 814 ***(refd)***
Shirley Koh Gek Ngo & Anor v. Tanah Emas Bio-Tech (M) Sdn Bhd [2014] 1 LNS 687 CA ***(refd)***
Sullivan v. Henderson [1973] 1 All ER 48 ***(refd)***
Sum Kum v. Devaki Nair & Anor [1963] 1 LNS 131 FC ***(refd)***
The Ayer Molek Rubber Company Bhd v. Bintang-Bintang Sdn Bhd [2013] 4 CLJ 820 CA ***(refd)***
Theow Say Kow & Anor v. Teoh Kiang Hong & Ors [2013] 1 LNS 1383 HC ***(refd)***
Veronica Lee Ha Ling & Ors v. Maxisegar Sdn Bhd [2009] 6 CLJ 232 FC ***(refd)***
Wong Wee Kheong & Anor v. Daya Bersama Sdn Bhd & Other Appeals [2013] 3 CLJ 969 FC ***(refd)***
Zulpadli & Edham v. Inai Offshore & Marine Engineering Sdn Bhd (In Liquidation) [2011] 6 CLJ 47 CA ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 4(1), 18(3), 33(1), 214(1)(d), 219(2), 243, 245, 252
Rules of Court 2012, O. 81 r. 1(1)(a)
Rules of the High Court 1980, O. 81
Specific Relief Act 1950, s. 18(2), (3), (5)
Companies Act 1948 [UK], s. 227

Other source(s) referred to:

Alex Chang Huey Wah, *Companies Winding-Up Handbook,* MLJ Handbook Series, p 193

For the appellant - Gan Khong Aik & Lim Bee San; M/s Gan Partnership
For the respondent - Alex Chang Huey Wah & Lim Soo Zee; M/s Alex Chang & Co

[Editor's note: Appeal from High Court, Kuala Lumpur; Suit No: D3-22-36-2003 (affirmed)]

Reported by Suhainah Wahiduddin

A

JUDGMENT

Idrus Harun JCA:

Introduction

[1] This is an appeal directed against part of the decision of the learned B High Court Judge given on 5 August 2014 in not granting the order for specific performance of cl. 15 of the agreement dated 2 March 1999 or *in lieu* thereof, damages in favour of the appellant. On 31 March 2015, we heard both learned counsel for the appellant and the respondent and accordingly dismissed the appeal unanimously.

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Facts

[2] The agreement entered into between the appellant and the respondent on 2 March 1999 was with respect to the sale and purchase of shares in Amore Marketing (M) Sdn Bhd (Amore) in which the appellant agreed to D purchase from the respondent 1,540,000 shares in Amore for 40 sen only per share with the total purchase price of RM616,000. After the execution of the agreement, the name of Amore Marketing (M) Sdn Bhd was changed to Amore New Image (M) Sdn Bhd. However, since May 1999, the appellant alleged, they had encountered problems with the respondent relating to matters concerning the value of the stock which was purportedly overstated, E the payment of commission which was supposed to be paid to the appellant for the purchase of 'Man Yoo' product from the Korean supplier and the exclusion of the appellant's representatives from the management of Amore. These problems resulted in due course, in irreconcilable differences between the appellant and respondent which could not be resolved.

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[3] By cl. 15 of the agreement, the appellant agreed that it could at its option sell its shares to the respondent in the event that the projected profit could not be reached or there was any irreconcilable dispute between the parties. For easy reference, cl. 15 of the agreement is reproduced below:

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> Should projected profits not be achieved within two (2) years from the date herein or irreconcilable differences occur between the shareholders, New Image can at its option sell its shares in AMORE to LOH at cost of 40 sen per share or such higher figure as is arrived by dividing shareholders equity by the number of paid-up shares receiving as settlement all New Image stock held by AMORE and such fixed assets H as are agreeable with a cash settlement for the balance and the right of access to all distributors and staff so as to operate again as a separate business. Unless a shorter period is agreed three months to be given.

[4] Due to the differences that had arisen, there were subsequently negotiations entered into between the parties in the year of 2000 with respect I to the selling price of the shares which were indicative of the exercise by the appellant, *qua* the shareholder of Amore, of their option to sell their shares in Amore to the respondent pursuant to cl. 15 of the agreement. The learned

judge, in this respect, found that the appellant had in fact exercised the said option under cl. 15 of the agreement. Based on the statement of agreed facts however, para. 4 thereof revealed that the negotiations failed and the appellant proceeded to file a winding up petition dated 22 January 2001 against Amore *vide* D2-28-73-2001 (the petition). The petition was nevertheless dismissed on 15 January 2002.

[5] As events transpired, the appellant, *circa* one year after the dismissal of the winding up petition, filed the instant action in the Kuala Lumpur High Court against the respondent on 2 January 2003 seeking, *inter alia,* an order that the respondent buys the appellant's shares in Amore pursuant to cl. 15 of the agreement dated 2 March 1999. Amore was in the meantime, wound up prior to the commencement of the trial of the instant suit in the court below *vide* an order dated 2 September 2010 in a Winding Up Petition D-28NCC-411-2010 (the winding up order) which was filed by a third party namely Newlane Laboratories Sdn Bhd. The trial date of this action was on 22 March 2011. The learned judge dismissed the appellant's action on 5 August 2014.

Crux Of The Appeal

[6] The appellant in its memorandum of appeal sets out seven grounds of appeal. In essence, the material ground of the appellant's appeal turns on their complaint that the learned judge did not grant the order for specific performance of cl. 15 of the agreement or damages *in lieu* thereof.

Could The Appellant Sells Its Shares In Amore To The Respondent

[7] As earlier-stated, Amore was wound up on 2 September 2010. The present suit was filed on 2 January 2003. The fact that Amore was wound up on 2 September 2010 was pleaded in para. 8 of the respondent's statement of defence dated 17 February 2011. Clearly, the appellant had knowledge about the winding up of Amore at the time the present action was pending in the court below. The relief of specific performance sought by the appellant, as clearly evident by cl. 15 of the agreement, would involve the transfer of the appellant's shares in Amore to the respondent. Section 223 of the Companies Act 1965 (the Act), in this regard, provides:

> Avoidance of disposition of property, etc.
>
> 223. Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void.

Section 223 of the Act thus prohibits any transfer of shares unless such transfer is sanctioned by the court. Moreover, any such transfer would also necessarily involve an alteration in the status of the members of the company which is also prohibited if it is effected after the commencement of the winding up of the company. The purpose may now seem obvious and indeed

it is trite that s. 223 is enacted to protect the interest of the creditors against disposal of the assets belonging to the company when a petition for winding up is presented (*Kimoyama Elektrik (M) Sdn. Bhd. v. Metrobilt Construction Sdn. Bhd.* [1990] 2 CLJ 795; [1990] 2 CLJ (Rep) 253; [1990] 3 MLJ 309, *Re Gray's Inn Construction Co. Ltd.* [1980] 1 All ER 814).

[8] The time the petition is presented is significant because under s. 219(2) of the Act, the winding up shall be deemed to have commenced at the time of the presentation of the petition for the winding up. Hence, any prohibited transaction which takes place after the presentation of the petition is void unless the court orders otherwise. In the present action, since Amore was wound up on 2 September 2010, any transaction which falls within s. 223 of the Act is prohibited. It is the established facts that no leave or sanction of court pursuant to s. 223 was granted to the appellant by the winding up court for the purpose of the transfer of its shares in Amore to the respondent in the event the court grants an order for specific performance of cl. 15 of the agreement.

[9] In *Sullivan v. Henderson* [1973] 1 All ER 48, the plaintiff claimed against the defendant for specific performance of an oral contract in which the defendant agreed to purchase certain shares in a company from the plaintiff and alternatively, damages for breach of contract. The company had been wound up. The relief of specific performance was sought after the winding up had commenced. Megarry J held that the court would not order the specific performance of a contract previously made for the sale of shares in it, for to do so would be to force on the transferee a transfer which, although valid as between him and the transferor, would be void under the Companies Act 1948 which has s. 227 equipollent to s. 223 of the Act (see p. 50 between the letters f to g). At p. 50 the learned judge said:

> … If before any question of a winding-up has arisen, V contracts to sell shares in a company to P, and then, after a winding-up order has been made, V sues P for specific performance, I think that any court would be most reluctant to force upon P, who had agreed to take a fully effective transfer of the shares, a transfer that, **although valid as between him and the vendor, would be void as against the company.** Counsel for the plaintiff was not able to contend for any contrary view; and in my judgment it would require remarkable circumstances to support making a decree in such a case. This plainly is not such a case, and in my judgment **the claim for specific performance must fail.** (emphasis added)

[10] Thus, based on *Sullivan v. Henderson*, it becomes immediately clear that in the present action, the order for specific performance cannot be granted as it would entail a transfer of shares which is void as against Amore because such transfer would offend s. 223 of the Act, unless it is sanctioned by the winding up court. Leave pursuant to s. 223 of the Act must therefore be obtained from the winding up court for such transaction to be valid.

[11] We shall next refer to the decision of this court in *Henrick International Hotels & Resorts Pte. Ltd. v. YTL Hotels & Properties Sdn. Bhd. & Ors* [2003] 2 CLJ 445; [2003] 3 MLJ 742 which was relied on by the learned judge in dismissing the appellant's action. The facts of the case bear striking similarities with the instant appeal:

> This was the appellant's appeal against the decision of the High Court allowing the application to strike out the appellant's petition … filed pursuant to section 181 of the Companies Act 1965 (the Act) in respect of a joint venture company, 'Trans-Pacific Hotels Sdn Bhd' ('the said company') set up by the appellant and the first respondent on equal equity shareholding. The … petition was filed on 16.1.1996 and in it, the appellant sought various reliefs, including, … **an order requiring the first respondent to purchase the appellant's shares in the said company** … the first respondent had on 18 October 1995 filed a winding up petition ('the winding up petition') against the said company pursuant to section 218(1)(ii) of the Act. On **19 January 1996**, the winding up petition was heard with the winding up order being granted …

It was held:

> (2) … Another compelling reason why the said petition could no longer be maintained after the granting of the winding up order of the said company and the appointment of a liquidator was the provision of section 223 of the Act, which provided that 'any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the court shall unless the court otherwise orders be void'. Thus, in view of this prohibition, **the prayers in the said petition requiring the first respondent to purchase the appellant's shares** in the said company at a price of RM7,998,000 or at a fair value to be assessed by a firm of independent auditors **cannot be entertained unless sanctioned by the court** (see p 754B-D).
>
> [3] … The other obstacle in the instant case was that **the liquidator was not substituted for or added as a party** in the said petition. It would be difficult to bind the liquidator in respect of an order made on the sales of shares of the said company as prayed for in the said petition (see p 754D-E). (emphasis added)

[12] The above decision shows that, firstly, any transfer of shares in a company which takes place after the commencement of the winding up of the company is prohibited under s. 223 of the Act. Such transaction, nonetheless, can be proceeded with if it is sanctioned by the winding up court. Secondly, it would appear that the liquidator should be substituted or added as a party, lest it would be difficult to bind the liquidator in respect of an order made on the sale of shares in the company. In postulating the second proposition, the Court of Appeal in the above case, referred to the Privy Council's decision in *Ferguson v. Wallbridge et al* [1935] 3 DLR 66 wherein Lord Blanesburgh at p. 82 said:

> … The question next arises whether they are also right in their further contention that this claim cannot be maintained or prosecuted in an action constituted as the appellant's action is. **And, as the company is no party to that action, the answer must, their Lordships' think, clearly be in the negative.** But assuming that by amendment the company were to be added as respondent, the Board, let it also be assumed, having power to direct such an amendment to be made, could the appeal then be maintained? This is the real question, and quite clearly, in their Lordships' judgment, it could have been so maintained if the company were not in liquidation. *Cook v. Deeks, ubi cit.*, is clear authority for this. But could it be so maintained now that the company is assumed to be in liquidation? And the answer must again, as their Lordship think, be in the negative … (emphasis added).

We would say, to state the obvious, that in the present action as with other cases, no order should be made which concerns Amore or its liquidator being an interested party, when they are not joined as a party to the suit. The Federal Court in *Majumder v. Attorney-General of Sarawak* [1966] 1 LNS 97; [1967] 1 MLJ 101 said:

> … The courts should not make declarations which concern persons interested but not joined as parties …

In the instant appeal, as the liquidator was not added to the suit nor made a party, it was difficult to bind Amore or its liquidator in the event an order for specific performance was made which in consequence would involve the transfer of shares from the appellant to the respondent.

[13] *Hendricks International Hotels, supra* was followed by the High Court in the case of *Theow Say Kow @ Teoh Kiang Seng, Henry & Anor v. Teoh Kiang Hong & Ors* [2013] 1 LNS 1383; [2014] 9 MLJ 32 wherein it was held that the impugned share transfers having taken place after the commencement of the winding up of the companies, and in the absence of any validation order granted by the winding up court, were contrary to s. 223 of the Act and void *vis-a-vis* the company although valid *inter se* between the parties to the transaction. In the instant matter, the learned judge in the court below correctly stated that Her Ladyship was bound by the decision of this court in *Henrick International Hotels* that s. 223 of the Act prohibited the transfer of shares in the manner prayed for by the appellant after the commencement of the winding up.

[14] We are mindful that the decision in *Nadaraja a/l Muthu* was followed in the following cases:

(a) *BIMB Musyarakah Satu Sdn. Bhd. v. Lee Kik Hooi & Ors* [2009] 8 CLJ 529; [2009] 8 MLJ 711;

(b) *Perbadanan Nasional Bhd. v. Dato' Ibrahim Ali* [2012] 1 LNS 585; [2012] MLJU 925; and

(c) *Lim Chiew v. Siteman Constructions Sdn. Bhd. v. Khairul Anuar Mamat* [2013] 1 LNS 693 *vide* Kuala Lumpur Winding-Up No. D-28NCC-186 of 2010.

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However, having read these authorities, it becomes apparent that *Henrick International Hotels, supra* was not cited *ergo* it was not considered nor followed by the High Court.

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[15] Learned counsel for the appellant raised a pertinent point touching on the true legislative intent of the phrase "transfer of shares" under s. 223 of the Act. For the appellant, it was submitted that the correct approach to be taken was found in *Nadaraja* and *BIMB Musyarakah Satu Sdn Bhd* to drive home the point that s. 223 of the Act only served to prohibit the improper alienation and dissipation of the property of, or belonging to a company and not a third party's property as in the instant case where the appellant, *qua* the shareholder of Amore, had opted to sell its shares in Amore to the respondent. The effect of learned counsel's argument, we apprehend, is that any transfer of shares in a company in respect of which a winding up proceeding has commenced, as between shareholders *inter se* or as between shareholders and third parties does not fall within the prohibition prescribed in s. 223 of the Act the reason being that these shares are not the property of the company. In construing s. 223 of the Act, the High Court in the cases cited above advanced the proposition that the words 'disposition of the property of the company' ought to be read conjunctively with the words "and any transfer of shares or alteration in the status of the members of the company" and that any transfer of shares which do not entail or involve disposition of the company's property do not come within the purview of s. 223 of the Act.

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[16] On the other hand, the High Court, in *Theow Say Kow* departed from the decision in *Nadaraja* as the learned judge there was of the view that the decision reached in *Nadaraja* was erroneous or *per incuriam*. We observed that the High Court in *Nadaraja* had not been apprised of the relevant statutory provisions and case law from the other jurisdictions as had been done in *Theow Say Kow*. The view expressed by the learned judge in *Theow Say Kow* that the words 'and any transfer of shares and alteration of members' must be read disjunctively instead of conjunctively with the other words appearing in s. 223 is, in our judgment, correct. To state the obvious, a company being an entity recognised by law as a legal person can own shares. Accordingly, the words 'Any disposition of the property of the company' would include shares which are owned by the company. These shares are assets or property of the company.

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[17] However, shares in the company owned by the company's shareholder belong to the said shareholder, not the company. The words 'any transfer of shares' appearing in s. 223 therefore, encompass shares within this latter category only. The shares are, as the learned judge in *Theow Say Kow*

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correctly stated, 'separate and distinctly different from assets or property of the company.' Clearly, the phrase, 'any transfer of shares' appearing in s. 223 of the Act, as the learned judge put it, 'relates to changes in the ownership of shares in the company.' We would once again emphasise that where such transfer takes place, it will inevitably entail the alteration in the status of the members or shareholders of the company which is also prohibited under the same section unless otherwise ordered by the court. However, this transaction is distinctly different from the disposition of shares owned by the company as such disposition does not involve any alteration in the status of the members or shareholders of the company. This distinction, in our judgment, reinforces the view that the phrase 'and any transfer of shares or alteration of members' must be read disjunctively with the other words appearing in s. 223 of the Act. Certainly, this is the second category of prohibited act or transaction which falls squarely within s. 223 which if proceeded with will be rendered void unless otherwise ordered by the winding up court. Thus, as between the parties to the transaction, if such transaction is valid, it may be enforceable but not insofar as the company is concerned as any transfer after the commencement of the winding up would be caught by the prohibition in and contrary to s. 223 of the Act and therefore void.

[18] To digress a little, in the case of *Zulpadli & Edham v. Inai Offshore & Marine Engineering Sdn. Bhd. (In Liquidation)* [2011] 6 CLJ 47; [2011] 4 MLJ 161, the liquidators applied *inter alia* for the return of RM1.4 million which the respondent had paid to the appellant for legal services rendered. The basis for the application was that the payment was made after a winding up petition against the respondent was presented and therefore void under s. 223 of the Act. This court held that a validation order was a doable option. But there was no application from the appellant for such an order. Thus, in the absence of a charging order or an order validating the payment under s. 223 of the Act, the entire RM1.4 million paid to the appellant was void and had to be returned to the respondent. Section 223 of the Act, to reiterate, prohibits both disposition of property or transfer of shares. The decision in *Zulpadli & Edham, supra*, though did not involve a transfer of shares, in our opinion illustrates the former that is the payment of the sum of RM1.4 million amounted to the disposition of the company's property. With regard to a transfer of shares, the position is undoubtedly similar where such transfer of shares is intended to be executed. Such a transfer, as we have said above, falls within the second category of prohibition as such it cannot be executed without a validation order or being sanctioned pursuant to s. 223 of the Act (see also *Companies Winding-Up Handbook*, edited by Alex Chang Huey Wah, MLJ Handbook Series, p. 193).

[19] Now, reverting to *Theow Say Kow*, the learned judge explained the rationale for the above proposition. According to His Lordship, such a transfer is void *vis-a-vis* the company as otherwise the shares may be

transferred to an impecunious party and this would be prejudicial to creditors in the event of a need to make a call on shareholders for any unpaid portion of shares citing the excerpts from the decision in the case of *Jordanlane Pty Ltd v. Kimberley Jane Elizabeth Kitching Andrew* [2008] VSC 426 which reads:

> Whilst any transfer of shares made after the commencement of a winding up is void unless appropriately sanctioned so far as regards any effect to be given to it by the company, a contract to transfer shares is not rendered void by the section as between the parties themselves. This is because the purpose of section 468(1) in relation to the transfer of shares is to prevent a shareholder from evading liability as a contributory by transferring shares to some impecunious person after a winding up has commenced and this purpose is sufficiently served by avoiding the transfer only so far as the company is concerned.

[20] We would, in amplification, add that in the instant action, Amore is a private company limited by shares. A company limited by shares by virtue of s. 4(1) of the Act is defined as:

> a company formed on the principle of having the liability of its members limited by the memorandum to the amount, if any, **unpaid** on the shares respectively held by them. (emphasis added)

Additionally, s. 18(3) of the Act explains that a statement in the memorandum of a company limited by shares that the liability of members is limited means that the liability of the members is limited to the amount, if any, unpaid on the shares respectively held by them. Simply stated, this means that the liability of members is limited to the amount unpaid on their shares. A member who has paid a full par value of the shares is under no further obligation to pay more to the company or its creditors. But, where a company limited by shares is being wound up, a member is liable to contribute to the extent of his shares remaining unpaid to the company or its creditors. This is clearly provided in s. 214(1)(d) of the Act which, together with s. 18(3) thereof, establish the principle of limited liability. Needless to say, any money payable by any member or shareholder to the company is a debt due from him to the company by virtue of s. 33(1) of the Act. Accordingly, where shares are not paid up or otherwise not fully paid up before the company is wound up, the liquidator may make calls and the court may order the contributory to pay (ss. 245 and 252 of the Act).

[21] The prohibition under s. 223 of the Act without doubt, will ensure that a shareholder will be prevented from evading liability as a contributory especially where there is the amount remaining unpaid in respect of the shares allotted to him and at the same time protects the interest of the creditors. An application for leave of the winding up court therefore is necessary as any such application will enable the court, upon evidence placed before it, to determine whether leave should be given or otherwise refused for the transfer of shares in the company. Such determination will inevitably

involve the fundamental question whether the interest of the creditors will be protected. For these reasons, we hold that *Theow Say Kow* was correctly decided.

[22] Learned counsel for the appellant further contended that s. 223 of the Act did not impose any timeline when leave or validation must be obtained and that any court could grant validation at any time citing the Court of Appeal case of *The Ayer Molek Rubber Company Bhd. v. Bintang-Bintang Sdn Bhd* [2013] 4 CLJ 820, and the Federal Court case of *Wong Wee Kheong & Anor v. Daya Bersama Sdn Bhd & Other Appeals* [2013] 3 CLJ 969. We would, on this point, say that in *The Ayer Molek* the *ratio* relates to the winding up court granting a stay of winding up order pursuant to s. 243 of the Act. The appellant, it is to be observed, cited *The Ayer Molek* as the authority that any court could grant validation or leave under s. 223 of the Act at any time. This argument is plainly wrong because an application for validation or leave must appropriately be heard by the winding up court so that the winding up judge will have control of all such applications made before him.

[23] It ought to be highlighted that the word 'court' appears twice in s. 223 of the Act. The first-mentioned 'court' means the court before which the winding up of a company has been commenced which must necessarily be the winding up court. The words 'the court' which appears thereafter undoubtedly refer to the first-mentioned court that is the winding up court. Learned counsel for the appellant did not seem to realise that, based on the clear wording of s. 223 of the Act and for the reasons that we have deliberated in the preceding paragraphs, his argument is inherently fallacious. Therefore, it is the winding up court that can consider whether any leave or sanction can be granted for any transfer of shares to be effected in order to avoid the prohibition under s. 223 of the Act. The learned judge in the court below was not sitting as a winding up judge. Her Ladyship correctly pointed out in the grounds of judgment that leave was required from the winding up court. Her decision was guided by the decisions in *Sullivan, Hendricks International Hotels* and *Theow Say Kow*. With all due respect, we could not accede to the argument urged for the appellant on this point.

[24] Turning now to the Federal Court's decision in *Wong Wee Kheong*, which learned counsel relied upon as the authority that leave or validation could be made at any time, it would be apposite to be reminded that the appellant only cited the first part of para. 13 but did not quote these important words:

> [13] … we are in agreement with the submission of learned counsel for the appellants that to insist that the purchasers must have applied for a validation after the companies was wound up, **there must be knowledge. Here the purchasers had no knowledge at all of the winding up order at the material time.** (emphasis added)

In the instant matter, the appellant had ample knowledge of the winding up of Amore, as it was set out in para. 8 of the statement of defence. However, despite having such knowledge, no validation or leave was applied for. Having been clearly brought to their knowledge of the winding up of Amore, the appellant should have applied for leave of the winding up judge first before proceeding with this action to transfer the shares in Amore to the respondent. This argument was, in our opinion, devoid of any merits and therefore we had very little hesitation in rejecting it.

[25] Learned counsel for the appellant, in his written submission referred to the Court of Appeal's decision in *Shirley Koh Gek Ngo & Anor v. Tanah Emas Bio-Tech (M) Sdn. Bhd.* [2014] 1 LNS 687 contending that, the High Court when satisfied that the option in cl. 15 of the agreement had been exercised, was not constrained by s. 223 of the Act to recognise that such transaction under cl. 15 was valid between the parties. Therefore, an order for specific performance could be granted subject to the appellant obtaining the necessary leave or order for validation. Otherwise, judgment for damages could be given.

[26] The appellant apparently, in putting forward the above proposition, relied on the relevant passage in *Shirley Koh* wherein the Court of Appeal said:

> [22] In support learned counsel cited the case of *Sullivan v. Henderson* [1973] 1 All ER 48 wherein the court dealt with s. 227 of the UK Companies Act 1948, which is in *pari materia* with s. 223 of our Companies Act 1965. In that case one question that arose was whether there was a case for specific performance of a contract for the sale of shares in a company that was made before the commencement of the compulsory winding-up of the company, but was being enforced after the winding-up has commenced. Megary J held that the claim for specific performance must fail for the reason that a court would be reluctant to force specific performance upon the purchaser who had agreed to take a fully effective transfer of the shares, when the transfer, although valid as between the purchaser and the vendor, would be void against the company. Accordingly judgment was given for the plaintiff for damages to be assessed.

[27] We would say on this aspect that the point of importance that has emerged from this proposition was that, in *Sullivan* there was an alternative claim for damages for breach of contract which had allowed Megary J to grant the order for damages *in lieu* of specific performance. In the instant case, there was plainly no alternative prayer for damages. That was the true reason why the High Court in the present action, did not grant any order for damages for any such order clearly dehors the pleadings. On the other hand, in *Shirley Koh*, the respondent's claim for specific performance was allowed by the High Court. However, the claim for specific performance was dismissed by this Court of Appeal when the appeal was allowed. With due

respect, in *Shirley Koh*, there was no award of damages by the High Court or the Court of Appeal although damages were prayed for. This was because the Court of Appeal found that there was no basis to order for specific performance or damages *in lieu* thereof. Obviously, *Shirley Koh* is not the authority for the proposition that *in lieu* of specific performance, damages can be granted.

[28] In this instant case, even if the agreement is valid between the appellant and respondent, nevertheless, for the reasons earlier discussed, an order for specific performance sought by the appellant after Amore had been wound up would require in effect a transfer of the appellant's shares in Amore to the respondent. The transfer falls squarely within the prohibition imposed under s. 223 of the Act unless sanctioned by the winding up court. It is abundantly clear therefore, that the order sought is legally impossible and is also difficult to bind the liquidator or Amore since they have not been joined as a party. Any such transfer would also entail an alteration in the status of the members of Amore which is also prohibited by s. 223 of the Act. Under the circumstances, we were satisfied that the learned judge was correct when she held that such transfer would require the sanction of the winding up court and the appellant failed to obtain such sanction.

Damages *In Lieu* Of Specific Performance Was Not Pleaded

[29] The proposition of the appellant before us was that notwithstanding the fact that the appellant only prayed for specific performance of cl. 15 of the agreement *vide* para. 13 of their statement of claim dated 2 January 2003, this court could nonetheless grant damages *in lieu* of specific performance, with no particulars of damages and prayers set out in the pleadings. It is also significant to mention that this issue was not ventilated during the trial in the court below. The learned judge had mentioned at the end of her judgment that the appellant had not prayed for damages in their pleadings and the court was consequently unable to grant any order as to damages. In support of his argument, learned counsel cited *Sullivan* wherein it was stated that:

> … It is trite that in application for an order of Specific Performance, Court can order damages …

[30] Unfortunately however, learned counsel seemed to have omitted to mention that in *Sullivan,* the court granted damages because it was prayed for as an alternative remedy. Megary J at p. 51 said:

> RSC Ord 86, r. 1, applies to proceedings in which the writ is endorsed with a claim for specific performance of an agreement, or in the alternative for damages.

The appellant, as alluded to earlier, did not pray for damages in their statement of claim. The word "damages" did not even appear anywhere in the statement of claim. The appellant, moreover, during the trial in the court below did not, during submission, mention or suggest damages be granted to the appellant.

[31] In *Perisai Wira Sdn Bhd v. Harun Minat Sdn Bhd & Ors* [2014] 5 CLJ 88 the High Court stated as follows:

> [32] In submissions, the plaintiff had also asked the court to order damages *in lieu* of specific performance. Again, this was not pleaded. The plaintiff argued that since the plaintiff had taken the position that damages were not adequate remedy or compensation, the decree of specific performance was sought. The plaintiff relied on the presumption to this effect under s. 11(2) of the Specific Relief Act 1950. It was further argued that the court had discretion whether or not to grant damages in the form of the return of the payments already made by the plaintiff in order to do justice between the parties. Section 66 of the Contracts Act 1950 and several decisions were cited in support.
>
> [33] … Since the plaintiff itself is uncertain as to what the agreement between the parties was for, how can the court even begin to make an order, let alone a pronouncement that the agreement is not valid and enforceable? An order for return of any benefits received under s. 66 of the Contracts Act 1950 requires the court to first make that finding before proceedings to order that relief. The court is impeded and constrained in making such an order on the present facts and circumstances.
>
> [34] I further agree with the defendants that the court cannot entertain this relief certainly not under its omnibus clause of **"such further or other relief as the Court deems just and proper"**. **A substantive relief in the nature of damages cannot be said to fall within such parameters.** (emphasis added)

[32] Learned counsel for the appellant referred to s. 18 of the Specific Relief Act 1950 contending that the wording of the section was clear. His submission, as we understood it, was that if the court decides that specific performance ought not to be granted or ought to be granted but not sufficient to satisfy justice of the case, the court should award compensation accordingly when the appellant was entitled to compensation. Further, the court has the inherent jurisdiction to grant damages even if it was not specifically pleaded as the appellant had prayed for "further and other reliefs deemed fit and proper". It was apparent that learned counsel was forced to rely on this omnibus prayer and attempted to formulate this line of defence because, for reasons best known to him, the issue of damages was not pleaded neither canvassed during the full trial.

[33] Section 18 of the Specific Relief Act 1950 does not give the appellant freedom to act as they wish for it clearly stipulates, and we say that learned counsel did not seem to realise, that a person "may also ask for compensation" for the breach of contract which means therefore that the appellant must necessarily pray for the compensation in the statement of claim if it is intended that the appellant wishes to also seek for damages. In fact, illustrations provided in s. 18(2), (3) and (5) plainly show that the plaintiffs sue for specific performance and for compensation, which was not

A the case here. Reference in this connection is made to O. 81 r. 1(1)(a) of the Rules of Court 2012 which clearly envisages a situation where an action for specific performance may be begun with or without an alternative claim for damages (*Insofex Sdn Bhd v. Labasama Group (M) Sdn Bhd (No. 2)* [2000] 6 CLJ 97). Accordingly, where a person wishes to claim for damages, he would B have to do so by way of an alternative claim for damages. Or he can otherwise sue for specific performance only. In the present appeal, the essence of the appellant's claim in the circumstances of the case was for specific performance only. They did not seek the alternative remedy of damages *in lieu* of specific performance.

C **[34]** The High Court, in *Insofex Sdn Bhd v. Labasama Group (M) Sdn Bhd (No. 2), supra*, touching on s. 18 of the Specific Relief Act 1950 and O. 81 of the Rules of the High Court 1980 explained that:

> In practice, a plaintiff who seeks an order for specific performance will ask for damages in addition to, or in substitution for specific performance. For D instance, a plaintiff will claim for specific performance of the agreement and 'further or alternatively' will claim for damages for breach of contract or in the words of *Horsler v. Zorro* [1975] Ch 302, the plaintiff will seek "damages *in lieu* of or in addition to specific performance".

The apparent lack of the fundamental pleas in the appellant's claim and E coupled with the fact that the appellant had adopted this alternative line of defence obviously due to their failure to obtain the sanction of the winding up court to enforce the specific performance of the agreement on the transfer of shares pursuant to cl. 15, would not entitle the appellant to rely on the omnibus prayer of 'such further or other reliefs as the court deems just F and proper'. Such reliefs would in our view constitute a principal and substantive claim *in lieu* of the relief for specific performance which certainly could not be said to be covered by the omnibus prayer *(Perisai Wira Sdn. Bhd. v. Harun Minat Sdn. Bhd., supra)*. We do not think that the fatal failure to plead this material point could be saved by invoking this omnibus prayer which in our opinion did not include nor cover such fundamental plea. Such G omnibus claims are not intended to cater for a situation where there is a manifest and obvious failure on the part of the parties to an action to plead material facts.

[35] It is a trite and settled principle that the appellate court tends to lean H against allowing issues not pleaded, raised or argued in the court of the first instance. In *Lee Ah Chor v. Southern Bank Bhd* [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239; [1991] 1 MLJ 428, the Supreme Court held that where a vital issue was not raised in the pleadings, it could not be allowed to be argued and to succeed on appeal. It would be manifestly unjust for the appellant to succeed before this court on a point not taken before the High Court (*Veronica* I *Lee Ha Ling & Ors v. Maxisegar Sdn Bhd* [2009] 6 CLJ 232; [2011] 2 MLJ

141). Also, it is not the function of this court to make out a case or provide a relief which is not adverted to in the pleadings (*Osaka Resources Sdn Bhd & Ors v. Foo Holdings Sdn Bhd* [2013] 1 LNS 984; [2014] 1 MLJ 461).

[36] Needless to say, in law, damages must be proved. Since the alternative remedy of damages was not pleaded, there was no evidence led on the quantum of damages sought by the appellant. The Federal Court in *Sum Kum v. Devaki Nair & Anor* [1963] 1 LNS 131; [1964] 1 MLJ 74 said:

> c. … In an action for damages it is for the plaintiff to prove his damages, it is not enough to write down the particulars, and "throw them at the head of the Court, saying: 'This is what I have lost; I ask you to give me this damages'." He has to prove it …'

We agreed with learned counsel for the respondent that the appellant failed to prove damages they had suffered as they did not lead any specific evidence for the purpose of proving the damages.

Conclusion

[37] The main bone of contention between counsel arose from the decision of the learned judge in not granting the order for specific performance of cl. 15 of the agreement and damages *in lieu* of the said specific performance. It was patently correct to hold that the order for specific performance of cl. 15 of the agreement would require the transfer of shares in Amore by the appellant to the respondent. It would also consequently entail an alteration in the status of the members of Amore once the transfer of shares took place. Such order was eminently one which would require leave or validation of the winding up court. No such leave or validation was obtained from the winding up court. The learned judge therefore, was correct in refusing to grant the order for specific performance as any such order would contravene s. 223 of the Act. We had also considered whether *in lieu* of specific performance, damages or compensation could be granted to the appellant. We agreed with the learned judge that there was manifestly no prayer for alternative remedy of damages pleaded in the appellant's pleadings. Section 18 of the Specific Relief Act 1950 plainly requires such damages or compensation to be applied. It was thus clear from the foregoing that the learned judge had not fallen into error or fundamentally misdirected herself in law and on the facts in coming to the conclusion as she did. There was absolutely no reason from which this court could interfere with the findings of fact arrived at by the learned judge. Accordingly, we dismissed the appeal with costs of RM25,000 to the respondent. The deposit shall be returned.